

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ForteCEO Services, Inc.,
d/b/a ForteONE,
Plaintiff,

vs.

No. 1:11-CV-05179

Terra Contracting, LLC;
Terra Abatement Services, LLC;
Terra I/S, LLC; and Down Under
Municipal Services LLC,

Defendants.

/

The discovery deposition of
JEFFREY T. CONRAD, CPA, JD, Volume II, taken in the
above-entitled case, on the 29th day of August, 2013, at
12:00 o'clock p.m. at the Tetzlaff Law Offices, 11 South
LaSalle Street, Suite 400, Chicago, Illinois, pursuant
to agreement of counsel.

Reported by: Karyn H. Chalem, RPR, CSR
License No.: 084-004167

1 A P P E A R A N C E S

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3 650 Dundee Road
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6 BY: JEFFREY R. ROSENBERG
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9 On behalf of the Plaintiff;

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14 BY: JAMES D. BENAK
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17 On behalf of the Defendants.

18 Also Present:

19 MATTHEW IODICE

20
21
22
23
24

1 I N D E X

2 WITNESS: PAGE:

3 JEFFREY T. CONRAD, CPA, JD

4 Examination by Mr. Benak 4

5

EXHIBITS:

6

5 Report dated August 22, 2013 5

7

6 Report dated April 5, 2013 6

8

7 Agreement between
9 ForteONE and Terra 8

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1 (Witness sworn.)

2 JEFFREY T. CONRAD, CPA, JD,
3 called as a witness herein, having been first duly
4 sworn, was examined and testified as follows:

5 THE WITNESS: I do.

6 EXAMINATION

7 BY MR. BENAK:

8 Q. Good morning, Mr. Conrad.

9 A. Good morning.

10 Q. We've met before, correct?

11 A. That's correct.

12 Q. This is a, as a practical matter, a
13 continuation of your deposition that we took some
14 time ago in this case and -- but for the record, to
15 make sure that we're -- we've got everything tied
16 down here, would you please spell your name, state
17 and spell your name.

18 A. It's Jeffrey, J-E-F-F-R-E-Y, middle initial
19 is T, Conrad, C-O-N-R-A-D.

20 Q. And, Mr. Conrad, we've been over kind of the
21 fundamentals of taking a deposition. You recall
22 all of those?

23 A. Yes, I do.

24 Q. I'm going to ask you questions and you give

1 me an answer. If I'm unclear at any time, just ask
2 me to clarify, and we'll make sure we understand
3 each other so that we can get a good question and a
4 good response.

5 A. Understood.

6 MR. BENAK: Can you mark this 1,
7 please.

8 (Exhibit 1 marked.)

9 BY MR. BENAK:

10 Q. Mr. Conrad, the court reporter has just
11 handed you what's been marked as Deposition Exhibit
12 Number 1. Would you --

13 MR. ROSENBERG: Jim, do you want to
14 make it Deposition Exhibit Number 5 because I
15 believe you used 4 in the last one?

16 MR. BENAK: That's fine, Deposition
17 Exhibit Number 5. Can you change the designation,
18 please?

19 MR. ROSENBERG: And that's up to you.
20 It was just a suggestion.

21 MR. BENAK: No, that's fine. That will
22 keep everything straight.

23 (Exhibit 5 marked.)

24 /////

1 BY MR. BENAK:

2 Q. Now looking at Deposition Exhibit Number 5,
3 Mr. Conrad, can you tell me what that is.

4 A. This is my revision to the April 5, 2013
5 expert witness report, and it's dated August the
6 22nd, 2013.

7 Q. It's a revision to your report, correct?

8 A. That is correct.

9 Q. Okay. Now, take a look at it real -- just
10 closely and make sure this is true and accurate and
11 complete.

12 A. Yes.

13 Q. Is it a true, accurate and complete copy?

14 A. Yes.

15 MR. BENAK: Okay. So that we have a
16 complete record here, let's put your previous
17 opinion of April 5th into the record, if you'd
18 please mark that as Number 6.

19 (Exhibit 6 marked.)

20 MR. BENAK: Off the record for just a
21 second.

22 (Off record discussion.)

23 MR. BENAK: Back on the record.

24 Thanks.

1 BY MR. BENAK:

2 Q. Mr. Conrad, you've been handed what's been
3 marked by the court reporter as Deposition Exhibit
4 Number 6. Could you identify that, please?

5 A. This is the expert witness -- my expert
6 witness report dated April 5 of 2013.

7 Q. Is that a true, accurate and complete copy
8 of your report?

9 A. Yes, it is.

10 Q. Okay. Now, in connection with the opinions
11 that you have given in this -- in your first
12 report, the April 5th report -- and let's make sure
13 we have some semantics down. I'll refer to your
14 April 5th report as either the April 5th report or
15 your first report, and I'll refer to the April 22nd
16 report as the April 22nd report or your second
17 report. Is that fair?

18 A. August 22nd report, yes, I understand.

19 Q. August, I'm sorry, August 22 as your second
20 report. Is that fair?

21 A. Yes.

22 Q. We'll understand each other if I use those
23 terms?

24 A. Uh-huh.

1 Q. Okay. This particular -- your April 5th
2 report was a report on -- or opinion on an
3 agreement between ForteONE and Terra, correct?

4 A. Yes.

5 MR. BENAK: Okay. Just to make sure
6 that we've got a complete record, I'd like to put
7 that agreement in the record as well, so if you
8 could mark that, please.

9 (Exhibit 7 marked.)

10 BY MR. BENAK:

11 Q. Mr. Conrad, the court reporter has handed
12 you what's been marked as Deposition Exhibit Number
13 7, and I'd ask you to take a look at that and
14 identify it for me, please.

15 A. This is the May 7, 2010 agreement between
16 ForteONE and Terra Contracting.

17 Q. And that's the agreement to which your first
18 and second reports relate?

19 A. Yes, it is.

20 Q. Now I'd like you to take a look at your
21 first report, the April 5th report, which is
22 Deposition Exhibit Number 7. Is that right?

23 A. 6.

24 Q. 6. And in your first report, you give an

1 opinion on the calculation of the fees due under
2 the agreement between the parties, which is
3 Deposition Exhibit Number 7, is that correct?

4 A. Could you repeat the question, please?

5 Q. Sure. In your April 5th report, you give an
6 opinion on the fees that are due under the May 7th
7 agreement, which is Deposition Exhibit Number 7,
8 correct?

9 A. That is correct.

10 Q. Okay. And if you go to page two of your
11 first report, your opinion on the fees is set out
12 at the bottom of page two and then it carries on to
13 page three, and those include the annual
14 performance fee and the sale incentive fee, is that
15 correct?

16 A. No, I don't follow you there.

17 MR. ROSENBERG: You might just want to
18 clarify that we're just going to ask a few
19 background questions about the first report.

20 MR. BENAK: These are foundational,
21 Counsel.

22 MR. ROSENBERG: Okay.

23 MR. BENAK: Okay.

24 THE WITNESS: Page two?

1 MR. BENAK: Yes, page two of your April
2 5th report.

3 THE WITNESS: All right.

4 BY MR. BENAK:

5 Q. You recite the basis of your opinion on the
6 annual performance fee and the sale incentive fee.
7 Do you see where I'm directing you?

8 A. I cover the basis for the opinion. I don't
9 have the calculations on that page.

10 Q. Understood. And this is the -- the formula
11 on which you base your opinion as to the amount due
12 under the agreement, is that correct?

13 A. Yes, it is.

14 Q. Now, as I understand your testimony in your
15 previous deposition, which we took on May 16th,
16 2013, your calculation of the annual performance
17 fee and the sale incentive fee and the formula for
18 that calculation is taken from pages seven and
19 eight of the agreement. Is that correct?

20 A. That is correct.

21 Q. Okay. And as you testified at your first
22 deposition on May 16th, your testimony was that you
23 had not looked beyond the formula on pages seven
24 and eight to determine your opinion on the amounts

1 due under the agreement, correct?

2 A. That is correct.

3 Q. Okay. And you also testified that you did
4 not consult with any of the principals to the
5 agreement, nor did you read any of the depositions
6 of the principals to the agreement prior to coming
7 to your opinion, correct?

8 A. I don't recall saying that.

9 Q. Okay. Well, I'll just ask you the question
10 outright. We may not have to go back to your
11 deposition.

12 Did you, prior to making your first opinion,
13 consult any of the principals to the agreement or
14 read any of their depositions?

15 A. I don't believe that I had read a deposition.
16 Again, I'm going back to prior to the first report,
17 the first deposition, that there had been some
18 consultation, just general discussion.

19 Q. Uh-huh.

20 A. That's all I can recall.

21 Q. Okay. Did you talk with Mr. Rittmanic or
22 Mr. Marshall about the intent of the agreement
23 prior to coming to your first -- or arriving at
24 your first opinion?

1 A. About the intent? I'm not sure I understand
2 what you mean by intent of the agreement.

3 Q. Well, did you ask them about what they were
4 trying to accomplish in the agreement -- let me
5 back up.

6 First, did you talk to them about the
7 agreement prior to arriving at your first opinion?

8 A. I recall maybe one telephone discussion with
9 Dave Marshall regarding specific items in the
10 analysis.

11 Q. Did you ask them specifically about the
12 intent of the agreement?

13 MR. ROSENBERG: Object to the form.

14 THE WITNESS: Not that I recall.

15 BY MR. BENAK:

16 Q. Okay. Did you ask them about their
17 understanding of the agreement?

18 A. Not that I recall.

19 Q. As I recall your deposition testimony on May
20 16th, you confined your analysis to the formula on
21 pages seven and eight to arrive at your opinion
22 without consulting other parts of the agreement.
23 Is that correct?

24 A. I'm not sure I understand your question.

1 Q. Well, did you think, in arriving at your
2 first opinion in this case, that it was necessary
3 for you to look at any other parts of the agreement
4 other than the formulas on pages seven and eight to
5 arrive at your opinion?

6 A. Yes. Well, to calculate the -- I want to
7 make sure I get the terminology correct.

8 To calculate the annual performance fee and
9 the sale incentive fee, I used the formulas on page
10 seven and eight of the agreement. As far as the --
11 I believe the interest calculated -- calculation is
12 based on a provision further back in the agreement,
13 but -- so I used page seven and eight to calculate
14 the fees.

15 Q. Did you -- as I recall your deposition on
16 May 16th, you didn't consult any other parts of the
17 agreement to inform your decision or opinion on the
18 amounts due under the agreement. Is that correct?

19 A. Well, there's -- other than any kind of
20 general definition section, I don't recall any right
21 offhand.

22 Q. Well, is it your testimony that prior to
23 arriving at your first opinion that you consulted
24 the definition section of the agreement?

1 A. Prior to formulating my -- the April 5
2 report, I read the entire agreement. The
3 calculations of the fees are based on the formulas
4 on page seven and eight.

5 Q. Now, in -- take a look at your August 22
6 opinion, which is your second report in this case,
7 which is Exhibit 5.

8 A. Are we -- could I ask a question? Are we
9 referring to it as a second report or a revision?

10 Q. I can call it whatever you want, Mr. Conrad.

11 MR. ROSENBERG: I believe you said --

12 MR. BENAK: I was going to call it the
13 second report. I thought that's how we referred to
14 it.

15 MR. ROSENBERG: Well, it is
16 technically, I believe, titled revised report, but
17 you can call it by its date. How about that?

18 MR. BENAK: We'll just call it the
19 August 22 report. How's that?

20 THE WITNESS: All right.

21 BY MR. BENAK:

22 Q. Okay. So if you'll take a look at the
23 August 22 report, which is Exhibit 5, and look at
24 page one, and as I -- well, just direct your

1 attention to that part of page one which pertains
2 to Down Under Municipal Service. Do you see that
3 on page one, in the middle of the page?

4 A. Yes.

5 Q. Okay. Now, you've revised your first
6 opinion to account for Down Under Municipal
7 Services revenues, as I understand your opinion, in
8 calendar year 2009. Is that correct?

9 A. No.

10 Q. Okay. Tell me what's correct, then. Tell
11 me what you did.

12 A. The report, the April 5 report, is revised
13 for the calculation of Down Under Municipal Services
14 EBITDA as it relates to the 2009 and the 2010
15 calendar year.

16 Q. Okay. And how is it revised?

17 A. The EBITDA calculation, which is stated
18 separately in schedule six, I'll just reference in
19 there that 2008 is just a -- it's a point of
20 reference. It really isn't used in the
21 calculations. The schedule six calculates Down
22 Under EBITDA for 2009 and 2010 separately, and then
23 that is brought forward to the EBITDA schedule
24 three, and you will note that it's separate -- the

1 Down Under EBITDA is separately stated and included
2 in the 2009 and 2010 combined entity EBITDA
3 calculation.

4 Q. Okay. And why did you find it necessary to
5 do that?

6 Let me -- before you answer that, let me
7 break that question up a little bit.

8 A. Sure.

9 Q. What effect does that change have on your
10 opinion?

11 A. It does not -- the calculation change has no
12 impact on the sale incentive fee. The annual
13 performance fee is adjusted by some small
14 percentage. I don't have the numbers right in front
15 of me to compare them, but the total annual
16 performance incentive fee for 2010, '11 and '12 is
17 reduced by a small amount.

18 Q. Okay. And what impact did your change have
19 on your calculation of EBITDA for those years?

20 A. Well, the Down Under EBITDA was included in
21 the combined entity EBITDA.

22 Q. And so what does that do for your
23 calculation of EBITDA -- EBITDA year over year as
24 it relates to the performance incentive?

1 MR. ROSENBERG: I object, compound.

2 BY MR. BENAK:

3 Q. Do you know what I'm saying?

4 A. No, I don't.

5 Q. Okay. What I'm asking you is what impact
6 your change had on the comparison of EBITDA year
7 over year.

8 MR. ROSENBERG: Same objection.

9 THE WITNESS: Well, there's another
10 entity included in EBITDA, so it increased EBITDA
11 for both years.

12 BY MR. BENAK:

13 Q. So it increased EBITDA for the first -- for
14 the first year, the base year, 2009, if you will,
15 is that correct?

16 A. Yes, it did.

17 Q. And it also increased it, then, for 2010?

18 A. Correct.

19 Q. And the overall impact is to reduce the
20 difference between those two years, is that
21 correct, in EBITDA?

22 A. I don't -- I still don't follow your
23 question.

24 Q. Well, as compared with your first report,

1 the change in EBITDA from 2009 to 2010 is reduced,
2 correct?

3 A. No, actually it's increased.

4 Q. Okay. And tell me how that impacts, then,
5 the sale incentive, because I'm not following what
6 you just told me.

7 MR. ROSENBERG: I think you
8 mischaracterized his testimony. I believe he
9 testified it doesn't impact the sale incentive.

10 THE WITNESS: I've already stated it
11 does not impact the sale incentive.

12 MR. BENAK: Did I say sale incentive?
13 I meant performance incentive on this.

14 THE WITNESS: The performance incentive
15 fee, as we've already covered, is based on 2009 as
16 a base year.

17 MR. BENAK: Correct.

18 THE WITNESS: The change from 2009 to
19 2010 actually increased, not decreased, because the
20 EBITDA increase for Down Under was \$370,000 in 2009
21 and it was \$431,000 in 2010.

22 BY MR. BENAK:

23 Q. Now, did you include the Down Under
24 calculation in your, for 2010, in your first

1 report?

2 In other words, in your first report, was
3 Down Under included in your 2010 EBITDA comparison?

4 A. Well, no. That's why the revised report was
5 written.

6 Q. So let me then ask the question I was asking
7 a little bit ago, and that is: Why did you think
8 that it was important to make this change?

9 A. Based -- after reading Mr. Fox's expert
10 report and attempting to reconcile some of the
11 calculations in his report and also after
12 consultation with counsel and with Dave Marshall, it
13 was my understanding that Down Under was one of the
14 entities that was covered under the May 7, 2010
15 agreement and should have been included in the
16 overall -- in the base year calculation as well as
17 the subsequent year calculations.

18 Q. Okay. And so you informed your opinion by
19 talking with Mr. Marshall about which companies
20 should have been included?

21 A. Correct.

22 Q. Okay. And then you also looked at the
23 agreement, as I understand your opinion, at the
24 definition section, which is page 11 of 15, is that

1 correct? Take a look at Exhibit 7, Mr. Conrad.

2 A. That is correct.

3 Q. Okay. And what part of the definitions did
4 you consult to inform your opinion?

5 A. The provision that I believe would be
6 applicable there would be the definition of -- the
7 second definition, which is "client," in quotes.

8 Q. Okay. And your information from
9 Mr. Rittmanic and your reading of the definition
10 section leads you to conclude that Down Under
11 should have been included in the base year as well
12 as the 2010 comparison year for purposes of the
13 performance incentive?

14 MR. ROSENBERG: Jim, I'm sorry, you
15 said Mr. Rittmanic. He said he talked to
16 Mr. Marshall.

17 MR. BENAK: Mr. Marshall, excuse me.

18 BY MR. BENAK:

19 Q. Do you understand my question or do you want
20 me to ask it again?

21 A. Why don't you try it again.

22 Q. Okay. So you talked with Mr. Marshall to
23 inform your opinion and you also consulted the
24 agreement at Section 1.1, "client," to inform your

1 opinion as to who or what entities were to be
2 included in the 2009 base year and in the 2010
3 comparison year, is that correct?

4 A. Well, it was not just limited to the 2010
5 comparison year. My question to Mr. Marshall was,
6 is Down Under, as you understood it, an associated
7 company under the -- under the definition of
8 "client," as he understood it, under 1.1.

9 Q. And he told you it was, as he understood it,
10 to be a company included in "client"?

11 A. And I -- and I would classify it as
12 associated because it didn't follow under subsidiary
13 and it wasn't a part of a consolidated group in a
14 financial reporting sense.

15 Q. But you were satisfied, after having
16 discussed with Mr. Marshall his intent and after
17 having read the definition of "client," that Down
18 Under should be included in the calculation
19 starting in base year 2009?

20 A. Yes.

21 Q. Okay. Now, what -- what effect does that
22 have on the -- or let me ask it a different way.

23 How does your new definition of "client" and
24 your new calculations using Down Under -- or

1 including Down Under in the calculations reflect on
2 the performance of the combined companies?

3 MR. ROSENBERG: Object to the form.

4 BY MR. BENAK:

5 Q. In your opinion.

6 A. Well, it increases the base year performance
7 and it increases the performance for each year after
8 that.

9 Q. Let me ask the question a little bit
10 differently. Did you think it was important to
11 include Down Under in your calculations to properly
12 reflect what the client -- what the performance of
13 the client, as defined in this agreement, was over
14 that period of time?

15 MR. ROSENBERG: Object to the form.

16 THE WITNESS: I felt it was appropriate
17 to include Down Under in the EBITDA calculation.

18 BY MR. BENAK:

19 Q. Okay. In your view, does that more properly
20 reflect what the, quote, client did over that
21 period of time?

22 A. It properly reflects the agreement --

23 Q. Does it --

24 A. -- between the parties.

1 Q. Does it more properly reflect the agreement
2 than your original opinion?

3 A. Yes, it does.

4 Q. Let's take a look at page two of your August
5 22 report, Mr. Conrad, and what I'd like you to
6 focus on is the fourth complete paragraph on page
7 two. And what you've said in the middle of that
8 paragraph, let me just read it into the record:
9 Our interpretation of the agreement is that the
10 EBITDA and fee calculations are to be made based on
11 the financial statements without exception, and any
12 adjustments to those financial statements, paren,
13 other than those provided for in the agreement,
14 closed paren, are limited to incorrect accounting
15 statements, paren, i.e., incorrect accounting for
16 deferred compensation, excess legal accruals,
17 inconsistent audit and tax accruals, and excess
18 insurance accruals, closed paren, not corrected
19 under audit or review as set forth in schedule
20 three.

21 Did I read that correctly?

22 A. Yes, you did.

23 Q. Okay. Now what I'd like to focus on are a
24 couple of things. First, you've referred to

1 incorrect accounting treatments. What do you mean
2 by that?

3 A. Transactions that were reported incorrectly
4 in the financial statements under generally-accepted
5 accounting principles.

6 Q. And so is it your opinion that the things
7 that you've corrected, i.e., those things that
8 you've set out, deferred comp, excess legal
9 accruals, inconsistent audit and tax accruals, were
10 incorrectly recorded in the financials of the
11 company?

12 A. Yes, that is our opinion.

13 Q. And so it's your opinion that the audited
14 financials that were provided for those two years
15 were wrong in the respects that you've stated in
16 this letter?

17 A. Yes. The audited financial statements were
18 incorrect as to those -- as to the treatment of
19 those issues.

20 Q. Okay. And is that simply a difference of
21 opinion between you and the auditors?

22 MR. ROSENBERG: Object to the form.

23 THE WITNESS: I'm not sure I understand
24 your question.

1 BY MR. BENAK:

2 Q. Well, I mean, what's the basis for your
3 statement that they're incorrect is what I'm asking
4 you.

5 A. Well, which one?

6 Q. Any of them. Why don't we focus on the
7 excess legal accrual.

8 MR. ROSENBERG: I'll object. This was
9 reviewed in the first deposition, but...

10 MR. BENAK: He's restated it here and I
11 think it's fair and I'm going to go into it. It
12 won't be long, Mr. Rosenberg.

13 THE WITNESS: The -- the excess legal
14 accrual is based on the -- our analysis of
15 financial statements and comparing one year to the
16 next and determining whether it's appropriate under
17 generally-accepted accounting principles to accrue
18 an expense and accelerate an accrual of an expense
19 into one year where you had not done so previously.
20 We've concluded that that was incorrect.

21 Now, there's a different -- we're using
22 a different standard there, is it correct
23 accounting or not. You have to understand that
24 auditors use a different standard. Auditors may

1 look at a financial statement and say, yes, there
2 is an incorrect accounting treatment on this
3 statement; however, we do not believe that
4 materially impacts the statements as a whole and we
5 don't think that it would change the conclusion of
6 the reader of the audited financial statements,
7 readers being those that are reading it for a
8 different purpose, therefore they pass on making
9 the adjustment.

10 So when you look at audited financial
11 statements, are there incorrect accounting methods,
12 are there incorrect accounting conventions, yes,
13 there are. They are not necessarily changed.

14 BY MR. BENAK:

15 Q. Okay. And where in the agreement, which is
16 Exhibit Number 7, do you find an instruction to
17 change the audited financial statements to comport
18 with your understanding of appropriate GAP?

19 A. There's no reference to it there.

20 Q. So you took the liberty of adjusting it,
21 knowing, however, that the agreement just specified
22 audited financial statements?

23 A. Well, the agreement actually -- let's go back
24 to the agreement.

1 The reference would be on page seven, and
2 it's simply under the incentive formula at the
3 bottom of the page, marked paragraph number one,
4 simply refers to as computed using audited
5 consolidated financing statements.

6 Q. Correct.

7 A. The changes that we are suggesting, first
8 off, they do not simply -- in some cases, they
9 remove expenses. In other case, we simply adjusted
10 an expense downward to properly reflect the timing
11 of the expense. That's -- those are the adjustments
12 that we're making to properly reflect the
13 accounting, the financial statements.

14 Q. And what I'm asking you is: Where in the
15 agreement do you find the authority to make
16 adjustments like that?

17 A. It does not state that on page seven or
18 eight.

19 Q. And you're making these adjustments, as you
20 say, to properly reflect the accounting for the
21 company?

22 A. That is correct.

23 Q. And to properly reflect the financial
24 performance of the company?

1 A. We are making the change to properly reflect
2 the financial statements.

3 Q. Okay. Which, if I may say, are designed to
4 reflect the financial performance of the company?

5 A. Well, I'd have to understand what you mean by
6 "financial performance."

7 Q. Well, what's the purpose of financial
8 statements?

9 A. Can be many purposes to financial statements.

10 Q. Well, is a financial statement designed to
11 give a correct or incorrect representation of the
12 financial performance of the company?

13 A. The financial statements are designed to
14 provide one with information so that the reader can
15 draw their own conclusions about financial
16 performance.

17 Q. And those financial statements are designed
18 to be accurate and complete and true and correct,
19 is that right?

20 A. As I stated earlier, those financial
21 statements are designed to be accurate and not
22 materially misstated.

23 Q. I want to go back to the legal accrual and
24 your statement that you were trying to, as I

1 understand your testimony and correct me if I'm
2 wrong, properly reflect the period in which the
3 legal expenses were incurred. Is that correct?

4 A. Correct.

5 Q. Okay. And as I recall your first report --
6 well, why don't we just look at it. Can you please
7 pull out your first report, your April 5 report,
8 and show me where you've treated the legal -- what
9 you now call the incorrect legal expense.

10 A. I believe we're on schedule three of -- page
11 ten, schedule three --

12 Q. Okay.

13 A. -- which is the only schedule on the page,
14 and it's -- the legal accrual is item -- it's the
15 second modification and there's a footnote related
16 to it, item D.

17 Q. Okay. And the add back for item D is
18 \$150,000?

19 A. The add back for item D is \$150,000 in
20 calendar year 2010; in trailing 12, 2-28-2011, it's
21 \$150,000; and then for 2011, it's actually a
22 separate item, which is 200,000.

23 Q. So what's the total legal accrual that
24 you've accounted for there?

1 A. I'm not sure I can answer that question
2 because there's three time periods you're referring
3 to.

4 Q. Okay. Let me ask it a different way, then.
5 What in the financial statements as provided to you
6 indicated that there should be \$150,000 added back
7 to the 2010 financials?

8 A. I'd have to see the financial statements. I
9 don't recall right offhand.

10 Q. Do you recall whether or not there was a
11 specific expense item that was shown as paid and
12 then not accounted for?

13 A. Well, we're a little bit off track if you're
14 referring to an expense item that is paid. This
15 would actually be picked up on a -- on the financial
16 statement balance sheet under either current or
17 long-term debt because it would have been accrued as
18 a debt, but yet it would not have been paid yet.

19 Q. I guess what I'm asking was: What's the
20 basis for your conclusion that \$150,000 in legal
21 expenses should be added back to the 2010 financial
22 statements?

23 A. It was information related to the financial
24 statements, but without those financial statements

1 in front of me, I can't really answer that question.

2 Q. Okay. As you sit here today, do you recall
3 whether or not that expenditure was actually made
4 in 2010?

5 A. Well, again, it -- the expenditure was not
6 made. It was picked up as an accrued liability. If
7 you accrue a liability on financial statements, that
8 means it was not actually paid yet. So it's not an
9 expenditure.

10 Q. Okay. And is it your understanding that
11 there was an accrual that you saw for 2010 that was
12 not reflected otherwise in the financials?

13 I'm trying to understand, Mr. Conrad, just
14 so we can kind of cut to the chase, what the basis
15 was originally for your inclusion of \$150,000 add
16 back EBITDA in 2010 for legal accrual.

17 A. I'm going to need to see the financial
18 statements to answer that.

19 Q. Can you tell from reference to your letter,
20 your original, your April 5th?

21 A. I'm reading the footnote below and --

22 Q. Would you, please.

23 A. The footnote below item number D refers to
24 that -- refers to there being an accrual of legal

1 expense in the financial statements, so that means
2 that it was an expense included in 2010 and it was
3 a -- in calendar year 2010 and it was an item that
4 was included in the income statement, but it was
5 reflected as a liability because it had not been
6 paid yet.

7 Q. And the \$150,000 for 2011, where did that
8 come from?

9 A. Well, the \$150,000 on the trailing 20 -- on
10 the trailing 2-28-11 is the same amount that's
11 included on the 2010, because the 2010 would have
12 been a year-end accrual at 12-31-10, which would
13 have been in the trailing 12-month 2011.

14 Q. Okay. I'd like to go back to something we
15 just covered a moment ago. Now, you've said at
16 footnote D: Per information provided to us, an
17 accrual was made on 12-31-10 regarding litigation
18 matters without the requisite conditions of a high
19 probability that a liability has been incurred and
20 the ability to reasonably estimate the amount of
21 the loss.

22 In lay language, Mr. Conrad, what does that
23 mean?

24 A. The -- the -- the provision -- the part of

1 the footnote that says condition of high
2 probability -- of a high probability that a
3 liability has been incurred and the ability to
4 reasonably estimate the amount of the loss is the
5 generally-accepted accounting principles standard
6 for accruing a liability as an expense -- and an
7 expense even before that expense has been paid.

8 Q. Okay. And it's your opinion that that
9 prerequisite was not made prior to taking the
10 150,000 dollar accrual?

11 A. That is correct.

12 Q. And so for 2010, you added that \$150,000
13 back?

14 A. Correct.

15 Q. Okay. And that, again, is something that
16 you've done to the original financial statements
17 that did not appear on the financial statements,
18 right?

19 A. Well, it appeared as a footnote in the
20 financial statement.

21 Q. Correct, but the treatment that you're
22 giving it here in footnote D and in this schedule
23 by adding it back is something that was not done in
24 the original financial statements, correct?

1 A. That is correct.

2 Q. And you've done that for what reason, to
3 more properly reflect where the loss should be --
4 or excuse me, where the expense should be recorded?

5 A. We've -- as stated in footnote D, we've
6 done -- we have added it back because in our
7 judgment, it does not meet the high -- it does not
8 meet the definition and standard for a liability to
9 be included in a financial statement.

10 Q. And so you've added it back to more properly
11 reflect the financial condition of the company,
12 correct?

13 MR. ROSENBERG: Object to the form.

14 THE WITNESS: We've added it back to
15 include it in the financial statements for the
16 company. In our -- in my opinion, it should have
17 been a footnote disclosure only.

18 BY MR. BENAK:

19 Q. And so in your opinion, the financial
20 statements are more accurate as you've treated them
21 than they would be as they were treated in the
22 original financial statements, correct?

23 A. With the -- in my opinion, the add back is
24 appropriate. If you're -- if you're asking me if

1 \$150,000 is a material misstatement that requires an
2 add back, I don't know. I'd need far more
3 information to make that judgment.

4 Q. Okay. But you've added it back because in
5 your judgment it makes the financial statements
6 more accurate?

7 A. Yes.

8 Q. Okay. And that add back increases the
9 performance incentive due to ForteONE under the
10 agreement, is that correct?

11 A. That is correct.

12 MR. BENAK: Give us a couple of
13 minutes, Mr. Rosenberg.

14 MR. ROSENBERG: Okay.

15 (Recess was taken from 12:43 to 12:47.)

16 MR. BENAK: Back on the record.

17 Thank you, Mr. Conrad. We have no
18 further questions.

19 MR. ROSENBERG: I have no questions.
20 We'll reserve signature.

21 MR. BENAK: Good. Thanks for coming
22 down, guys.

23 THE REPORTER: Do you want it
24 transcribed?

1 MR. BENAK: Yes.

2 THE REPORTER: Do you want a copy?

3 MR. ROSENBERG: I'll have a copy, a
4 mini e-tran, please.

5 (Deposition concluded at 12:47.)

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ForteCEO Services, Inc., d/b/a ForteONE,
vs.
Terra Contracting, LLC, et al.

1:11-CV-05179

I hereby certify that I have read the
foregoing transcript of my deposition, given on August
29, 2013, consisting of pages through ,
inclusive, and I do again subscribe and make oath that
the same is a true, correct and complete transcript of
my deposition so given as aforesaid, as it now appears.

Please check one:

I have no corrections
Number of errata sheets
enclosed

(signed)

JEFFREY T. CONRAD, CPA, JD

SUBSCRIBED AND SWORN TO
before me this day
of , A.D., 2013.

NOTARY PUBLIC

1 CERTIFICATE
2 OF
3 CERTIFIED SHORTHAND REPORTER
4

5 I, KARYN H. CHALEM, a Certified Shorthand
6 Reporter of the State of Illinois, CSR License No.
7 084-004167, do hereby certify:

8 That previous to the commencement of the
9 examination of the aforesaid witness, the witness was
10 duly sworn by me to testify the whole truth concerning
11 the matters herein;

12 That the foregoing deposition transcript was
13 stenographically reported by me and was thereafter
14 reduced to typewriting under my personal direction and
15 constitutes a true and accurate record of the testimony
16 given and the proceedings had at the aforesaid
17 deposition;

18 That the said deposition was taken before me
19 at the time and place specified;

20 That I am not a relative or employee or
21 attorney or counsel for any of the parties herein, nor a
22 relative or employee of such attorney or counsel for any
23 of the parties hereto, nor am I interested directly or
24

1 indirectly in the outcome of this action.

2 IN WITNESS WHEREOF, I do hereunto set my
3 hand at Chicago, Illinois, this 9th day of September,
4 2013.

5

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9 KARYN CHALEM, CSR, RPR

CSR No: 084-004167

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